UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE GENETICALLY MODIFIED RICE LITIGATION	)))	4:06 MD 1811 CDP

This order Applies to:

Beaumont Rice Mills, Inc. v. Bayer Cropscience LP, et al., 4:07CV524 CDP

MEMORANDUM AND ORDER

Plaintiff Beaumont Rice Mills, Inc. has moved to remand this case to state court. Defendants oppose remand, arguing fraudulent joinder and misjoinder of the non-diverse defendants. Plaintiffs are citizens of Texas, and their only claim against the Texas defendants is for negligence. I agree with defendants that Texas law does not recognize a legal duty to "inspect rice seed for a genetic modification and to exercise reasonable care to prevent rice seed with this unknown genetic modification from cross-contaminating other rice seed." The Texas defendants have been fraudulently joined to defeat diversity jurisdiction, so I will disregard their citizenship. Diversity jurisdiction thus exists, and I will deny the motion to remand.

Factual Background

Plaintiff Beaumont Rice Mills, Inc. is a rice mill in Texas. Beaumont originally filed this action in Texas state court, naming as defendants Bayer

Cropscience LP, Bayer CropScience Holding Corporation, Bayer Corporation, Starlink Logistics Inc. ("SLLI"), Texas Rice Improvement Association ("TRIA"), and a number of seed farmers: Raymond Franz, Jacko Garrett, John Griffin, Rice Belt Warehouse Inc., and Winco.[1] The Bayer Defendants removed this case to federal court in the Southern District of Texas, asserting diversity jurisdiction. The case was then transferred to me for pretrial proceedings as part of the multi-district litigation case. Plaintiffs are Texas citizens; the Bayer Defendants and SLLI are citizens of states other than Texas, but TRIA and the Seed Farmer Defendants are citizens of Texas. There is no dispute that the amount in controversy exceeds $75,000.

Beaumont alleges that Louisiana State University's 2003 Cheniere foundation seed was contaminated by a type of genetically modified (GM) rice known as LLRICE 601. Beaumont alleges that TRIA purchased contaminated Cheniere foundation seed from LSU and sold it to the Seed Farmer Defendants, who produced the next generation of seed, which they sold as registered and

[1] In addition to the arguments that apply to all of the non-diverse defendant, defendants TRIA and Rice Belt argue that they cannot be held liable under the Texas Civil Practice and Remedies Code because they did not purchase or sell any 2003 Cheniere foundation rice from LSU. See Tex. Civ. Prac. & Rem. Code Ann. § 82.003 (2003). Defendant Garrett argues that he was fraudulently joined because he did not engage in planting, harvesting, or selling in his individual capacity. The dismissal of TRIA, Rice Belt, and Garrett would not solve the jurisdictional problems in this case because Franz, Griffin, and Winco would remain non-diverse defendants. As a result, I will not address these arguments.

certified seed to unidentified Texas rice farmers. Beaumont alleges that it purchased this contaminated rice from the unidentified rice farmers or from unidentified storage and drying firms. Beaumont alleges that the contaminated rice was commingled with uncontaminated rice, and that the commingling damaged its plant and equipment.

Beaumont asserts negligence against all defendants. As to the Texas defendants, Beaumont alleges:

> The Seed Farmer Defendants [defined to include TRIA], their agents, assigns, predecessors, and/or servants, failed to adequately inspect, test, or otherwise ascertain the contaminated nature of the long grain rice supplied to Plaintiff, and such failure was a proximate cause of property damages to the Plaintiff.

It also alleges, as to all defendants, including the Texas defendants:

> All Defendants, their agents, assigns, predecessors, and/or servants, failed to exercise reasonable care in the manufacture, gathering, transporting, and delivery of the contaminated rice to the Plaintiff, proximately causing damage to the equipment, building, and appurtenances, and stored rice of the Plaintiff.

Beaumont seeks compensatory damages for income and profits, remediation of equipment and facility, and consequential damages and interest. It also seeks punitive damages, alleging that all defendants caused the contamination through intentional or reckless conduct.

Discussion

A defendant may remove an action from state court to federal district court if the action is within the district court's original jurisdiction, unless an act of Congress expressly provides otherwise. 28 U.S.C. § 1441(a). Under the doctrine of "fraudulent joinder," a court may disregard the citizenship of a non-diverse defendant who was frivolously joined in an effort to defeat removal of a diversity case. Commercial Sav. Bank v. Commerical Fed. Bank, 939 F. Supp. 674, 680 (N.D. Iowa 1996). Defendants, as the parties seeking removal and opposing remand, have the burden of establishing federal subject-mater jurisdiction. In re Business Men's Assur. Co. of America, 992 F.2d 181,183 (8th Cir. 1993) (citing Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174, 181 n. 13 (8th Cir. 1978)).

"Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants." Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2002) (citation omitted). In analyzing fraudulent joinder, the court focuses not on the artfulness of the pleadings but on "whether there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved." Wilkinson v. Shackelford, 478 F.3d 957, 963 (2007) (quoting Filla v. Norfolk S. Ry., 336 F.3d 806, 811 (8th Cir. 2003)).

Under Texas law, a negligence claim has three elements: "(1) a legal duty owed by one person to another, (2) a breach of that duty, and (3) damages proximately caused by the breach." Madison v. Williamson, 2007 WL 2833016, at *3 (Tex. Ct. App. Sept. 27, 2007) (citing D. Houston, Inc. v. Love, 92 S.W.3d 450, 454 (Tex. 2002). Under Texas law, duty is a threshold question that is determined as a matter of law. Military Highway Water Supply Corp. v. Morin, 156 S.W.3d 569, 572 (Tex. 2005). To determine whether a defendant owes a legal duty under Texas law, courts consider several interrelated factors: the risk, foreseeability, and likelihood of injury, weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994). Generally, the most important factor is foreseeability. Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990).

Texas courts have stated that the test for foreseeability is "whether a person of ordinary intelligence would have anticipated the danger his or her negligence creates." Guerra v. Regions Bank, 188 S.W.3d 744, 748 (Tex. Ct. App. 2006). To phrase this another way, the issue is "what one should under the circumstances reasonably anticipate as a consequence of his conduct." Way v. Boy Scouts of

Am., 856 S.W.2d 230, 234 (Tex. Ct. App. 1993)); see also Foster v. Denton Indep. School Dist., 73 S.W.3d 454, 465 (Tex. Ct. App. 2002). The defendant need not anticipate the precise manner in which the injury will occur, but the injury needs to be of a general character so that defendant might reasonably anticipate it. Guerra, 188 S.W.3d at 748.

Beaumont contends that the Texas defendants owed it a legal duty to inspect their rice seed for a genetic modification and to exercise reasonable care to prevent rice seed with this unknown genetic modification from cross-contaminating other rice seed. Beaumont also alleges that the Texas defendants failed generally to use reasonable care in the manufacture, gathering, transporting, and delivery of the contaminated rice. Defendants argue that there is no Texas case law recognizing or supporting such duties on the part of Beaumont.

Texas cases that have found a duty to inspect can be divided into three situations: (1) where there is a contractual duty to inspect , (2) where the parties have a special relationship such as employer/employee or occupier/invitee, and (3) where the thing to be inspected was inherently dangerous and deadly, such as electric wires, gas lines, or railroads. See Deleon v. DSD Development, Inc., 2006 WL 2506743, at *7 (Tex. Ct. App. August 31, 2006) (finding no duty to inspect where the contract did not impose such a duty); Forrest v. Vital Earth Resources,

120 S.W.3d 480, 491-92 (Tex. Ct. App. 2003) (finding that an employer had a duty to inspect a ladder that injured an employee when the employer chose the ladder and was in a better position to foresee possible dangers from its use); Kovar v. Krampitz, 941 S.W.2d 249, 255 (Tex. Ct. App. 1996) (holding that while an owner or occupier has a duty to keep the premises under its control safe, premises liability did not apply when a minor's death was caused by the minor's drinking); Zippy Prop., Inc. v. Boyd, 667 S.W.2d 312, 315 (Tex. Ct. App. 1984) (holding an owner liable to invitee for failure to inspect); Texas Power & Light Co. v. Holder, 385 S.W.2d 873, 883 (Tex. Ct. App. 1965) ("A proprietor dealing with so dangerous and deadly an agency as electricity is bound to a continuous inspection..."); Texas Public Serv. Co. v. Mireles, 149 S.W.2d 298, 302 (Tex. Ct. App. 1941) (stating that a gas company owes a duty to inspect the gas lines it uses exclusively); Texas & N.O.R. Co. v. Billingsley, 94 S.W.2d 268, 271 (Tex. Ct. App. 1936) (stating that railroads owe a duty to inspect railroad cars). Outside of these situations, Texas courts have refused to impose liability for failure to inspect when there was no allegation that the defendant knew of any probability of harm. See Paschall-Texas Theaters v. Waymire, 81 S.W.2d 767, 770 (Tex. Civ. App. 1935).

None of these situations exists with regard to Beaumont's claims against the

Texas defendants. There is no allegation that these defendants had superior knowledge to the plaintiffs of the rice contamination. In fact, there is no allegation that the non-diverse defendants were even aware of the existence of LLRICE 601, let alone that it had contaminated the rice supply. They had no reason to conclude that their rice was inherently dangerous. Certainly, rice seed in generally is not inherently deadly or dangerous so that the potential for harm is obvious. There is no allegation of any clause in a contract requiring inspection of the rice seed for genetically modified seed, and there is no allegation of a special relationship between the parties outside the contract. As a result, I believe this case is more akin to the situation in Waymire, where the defendant was unaware of the danger to a patron and did not have a duty to inspect other patrons to prevent some unknown danger. 81 S.W.2d at 772.

With regard to Beaumont's general allegation of negligence, I also conclude, based on the facts alleged in the complaint, that the non-diverse defendants did not violate a duty to exercise reasonable care. The non-diverse defendants can only be liable for that which a person of ordinary intelligence would have anticipated. Without allegations of knowledge of the existence of LLRICE 601 or contamination of the rice supply, no reasonable person would have anticipated that the rice the non-diverse defendants purchased was

contaminated and would cause damages to future purchasers. While it is possible for food to be contaminated with GM material, there is nothing in the facts of this case that would have led the non-diverse defendants to anticipate a danger of injury to another when they bought and sold rice seed. See Owens v. Comerica Bank, 229 S.W.3d 544, 548 (Tex. Ct. App. 2007) (noting that although it was possible for a bank account to be used for a wrongful purpose, the bank had no reason to anticipate that danger when it opened and maintained the accounts).

Given the lack of allegations concerning the non-diverse defendants knowledge of LLRICE 601, I must conclude that there is no reasonable basis for concluding that Texas would impose liability. In so ruling, I am not ruling on the Bayer defendants' duties with regard to LLRICE 601, nor am I stating that a defendant could never be liable for selling a food product that has been contaminated with GM material. It is possible that strict liability might apply to such claims if it were alleged that the GM material was dangerous or hazardous to human health. Beaumont has not raised a claim for strict liability, and its complaint does not contain any allegations that LLRICE 601 is dangerous.

Conclusion

Beaumont has failed to state a colorable claim for negligence against the non-diverse defendants under Texas law. As there is no colorable claim against

the Texas defendants, I may disregard their citizenship in determining whether diversity jurisdiction exists. Without those defendants, there is complete diversity. Removal was therefore proper, and I will deny the motion to remand.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs Beaumont Rice Mills, Inc.'s motion to remand [#275, #15] is denied.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of October, 2007.